Government Secrecy vs. Public Access

by Fred Harwell

THERE are bad apples in most bureaucratic barrels, so it is not surprising when high-level government employees occasionally depart from office under strained circumstances. But the resignations under fire of two members of the State Banking Commission on April 27, 1978, proved to be more disruptive and controversial than most other personnel shake-ups. Within days of the announcement that the Banking Commissioner and the Deputy Banking Commissioner had been asked to resign because of official misfeasance, the Raleigh *News & Observer* was suing for full disclosure of the investigative report which had led to the dismissals and the Executive Branch had been cleaved by Governor Hunt's release of a "summary" of the report over the objections of the Justice Department and the State Bureau of Investigation. While interest in the resignations soon subsided, Hunt's handling of the matter left questions both about the legality of his actions and about the state's policies regarding suppression of information gathered at taxpayers' expense and used to shape decisions which affect the lives of its citizens.

Debate about "public access" has always been an essential aspect of politics in this country. "A popular government without popular information," James Madison warned the framers of the Constitution, "is but a prologue to a farce or a tragedy or perhaps both." The Bill of Rights, ratified in 1791, seemed to embody the concept of "public access" in the First Amendment admonition that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." But it was not until 1966, after 11 years of committee consideration, that Congress enacted the Freedom of Information Act (5 U.S.C. 552), which for the first time gave private citizens, including journalists, clear authority to obtain the release of many previously unavailable federal documents and records. The Freedom of Information Act (FOIA) repealed an earlier law which reserved the government's right generally to withhold information "for good cause found" and "in the public interest." These vague standards had effectively foreclosed public access by placing the burden on private citizens to prove, first, that there was no "good cause" for denying the release of records and documents, and then that the petitioner was "legimately and properly concerned" about the information being sought.

North Carolina has no state freedom of information law, but the concept of public access to government documents has been manifest in state statutes since at least 1935. That year the General Assembly produced "An Act to Safeguard Public Records . . ." which declared, among other things, that documents of the state "and of the counties and municipalities thereof constitute the chief monuments of North Carolina's past and are invaluable for the effective administration of government, for the conduct of public and private business, and for the writing of family, local and state history." The 1935 law defined "public records" as all written and printed matter "made and received in pursuance of law by the public officers" of the state as well as of counties and municipalities, and required that "every person having custody of public records shall permit them to be inspected and examined at reasonable times . . . ."

Over the years this early public records law has been revised by the General Assembly, and as recently as 1975 the definition of "public records" was substantially expanded to include "all documents . . . or other documentary material, regardless of physical form or characteristics." (G.S. 132-1) At the same time, exceptions have been carved out of the definition of "public records," including state tax returns and state personnel files. Such statutory exceptions are usually intended to protect personal or proprietary information from unnecessary disclosure. They reflect, among other things, a legislative effort to balance the concept of public access against the practical need to maintain the confidentiality of some government records. In North Carolina this balance is achieved by patchwork "privacy" amendments to various provisions of the General Statutes. Under federal law the balance is established by refinements in the controlling language of the FOIA which are enumerated within the law itself, and by the Privacy Act of 1974 (5 U.S.C. 522), which provides for disclosure of the existence of

Fred Harwell, a writer and lawyer, is an associate director of the Center.

federal records kept on private citizens and for inspection by individuals of records which pertain to them.

While the Freedom of Information Act and the Privacy Act have not been devoid of criticism and controversy, they are generally regarded as positive steps in the direction of greater public access. The disorganized state approach of combining an omnibus public records law and a variety of specific privacy amendments, on the other hand, has restrained access in North Carolina with sometimes befuddling statutory gymnastics. In 1975 the legislature removed state personnel files from the inspection provisions of G.S. 132-6 but not from the definition of "public records" in G.S. 132-1, thereby creating a hybrid document that is both "public" and unavailable to the public. (G.S. 126-22) A separate 1975 amendment (G.S. 126-23) specified that certain personnel information was, after all, to be held open for inspection, while another amendment (G.S. 126-24) declared that "all other information" in state personnel files "is confidential." In 1977 the legislature elaborated this statutory maze with additional "personnel act" amendments, but it soon became apparent that the unwieldy effort to dampen access had, instead, swamped it. One of the first bills introduced in the 1978 General Assembly was an amendment to G.S. 126-24 for the purpose of allowing the easier release "of certain information pertaining to state employees," including justifications for promotions and firings.

A less complex but more troubling exception to the public records law was enacted in 1947 as an amendment to Chapter 114, pertaining to the State Bureau of Investigation. Language was added to G.S. 114-15 which stated that "all records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records . . . and may be made available to the public only upon an order of a court of competent jurisdiction." Disclosing little or no sensitivity to questions of public access or the protection of individual privacy, the language of this amendment has been interpreted by state courts as a broad prohibition against releasing the contents of SBI documents *to anyone*. Under state law even a criminal defendant is accorded no right to view the SBI reports relating to his case, and the North Carolina Supreme Court has consistently ruled that a judge's refusal to give SBI reports to a criminal defendant is not grounds for overturning a lower court judgment. The matter is less clear under federal law, where U. S. Supreme Court opinions suggest that a defendant might be entitled under some circumstances to have access to such reports.

Though often subjected to courtroom attack, the 1947 amendment to G.S. 114-15 had never seemed politically controversial until May 10, 1978. On that date, without deferring to the authority of a judge, Governor Hunt released his "summary" of the SBI investigation into the activities of the two Banking Commission officials who had recently resigned.

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In doing so, Hunt was following a suggestion made several days earlier by *News & Observer* editor Claude Sitton, who wrote without reference to the language of the statute that its purpose was merely to prevent disclosure of "unverified information" and "the identities of SBI informants." In his newspaper column, Sitton opined that the purpose of the law could "be served . . . by making a sanitized version of the report" available through the Attorney General rather than the courts. The Governor's summary, which did omit sensitive information such as the names of sources, nevertheless contained verbatim passages from the original Bureau report. Opinions about the implications of Hunt's actions would differ, but some state attorneys conceded later that by unilaterally releasing portions of the SBI files the Governor might have violated the letter if not the spirit of the General Statutes of North Carolina.

GOVERNOR Hunt's decision to reveal the substance of the SBI report did more than place him in a tender legal position and open a schism between his office and the Justice Department. It also brought into sharp focus the need for reorganization and clarification of state laws pertaining to public access. Recognizing that "this case raises serious questions about the handling of SBI investigative reports," the Governor acknowledged that "the citizens of North Carolina should have a full accounting of the circumstances behind the resignations of two top (state) officials . . . . Clearly, we have a conflict between the public's right to know and the need for confidential SBI investigations. It is difficult to know how to reconcile that conflict."

The issue of access versus confidentiality had been raised in this instance because members of the Attorney General's staff who were sworn agents of the SBI conducted an investigation into the activities of two public officials. The Governor and his staff agreed with journalists, who were trying to obtain information about the circumstances of the resignations, that the public had a right to know what was going on inside the State Banking Commission. "We simply had a responsibility to account for the firings," Gary Pearce, the Governor's press secretary, explained. "Our responsibility was to account for why we wanted them to resign." According to Jack Cozort, Hunt's legal advisor, the Governor "realized

there was some problem" with the release of the SBI report. "We resolved it by releasing basically what we considered a summary rather than the report itself," Cozort said. "You do come to a point sometimes when the people do have a certain right to know, particularly when an investigation involves essentially public servants. The people deserve more explanation about that than they would (about) other SBI investigations which may not necessarily involve public employees."

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But other state lawyers disagreed, both with Hunt's decision and with his resolution of the statutory conflict between access and confidentiality. Assistant Attorney General Andrew Vanore, who represented the Justice Department in the newspaper suit to obtain the full report, objected to the precedent which he said might be set by the release even of a summary of the investigation. He argued that SBI work would be impeded in the future, especially if sources feared that their identities might be revealed. Mike Carpenter, legal advisor to the Director of the Bureau, felt that G.S. 114-15 effectively barred disclosure either of the report or of a summary of its contents: "I think it was the intent of the legislature to make it absolutely clear that SBI reports were not to be made available to the public without a court finding it something that ought to be done. I don't think the legislature intended that a private citizen could walk in off the street and say I want to see a copy of an SBI report . . . ."

WHAT *was* the legislature's intent?

In North Carolina, as in many other states, it is often difficult to know precisely what policies have been codified in the General Statutes because there is no "legislative history" or other record of committee discussion and floor debate. Reasonable extrapolation based on the language of the statute is frequently the only means of arriving at an interpretation of the policies which lie behind the words, though even this is not always a successful, or even satisfactory, process. The language of G.S. 114-15 plainly removes SBI "records and evidence" from the definition of public documents. But what are "records and evidence?" William Lassiter, counsel for the *News & Observer*, took the view that G.S. 114-15 did not even apply. "It is my opinion," he said, "that the (SBI) report does not come within the meaning of 'all records and evidence.' " Not surprisingly, Lassiter's interpretation agitated the opponents of disclosure in the Justice Department and the SBI. They feared that every one of the more than 5,000 investigative reports produced annually might be thrown open to public scrutiny. "What we're trying to do," said Carpenter, the Bureau's lawyer, "is to protect the principle" of confidentiality.

INTENSIFYING distrust of big government has recently resulted in a profusion of both state FOIA laws guaranteeing access to information and state privacy laws limiting "official" intrusions into the private lives of private citizens. Although three limited privacy bills were passed by the 1975 North Carolina General Assembly, including the amendments pertaining to state personnel files, the state's information access law has never been overhauled to bring it into line with changes in the relationship between the people and their public servants. When "An Act to Safeguard Public Records . . ." was added to the statutes in 1935, there was no State Bureau of Investigation.* Since 1947, when SBI records were accorded at least a limited cloak of secrecy, the Bureau has expanded both in numbers of agents and in the scope of its operations. If each of the more than 5,000 reports filed annually by the SBI were about a different person, one in every one thousand North Carolinians might have been the subject of a confidential state police inquiry during 1977. Over the past decade, a dossier with information about one in every one hundred North Carolinians might have been added to SBI records. But under state law there is now no way for private citizens to determine whether they have ever been investigated by the SBI or, if they have, to find out what information has been gathered about them and why.

There is, clearly, a substantial need to protect the confidentiality of certain government records. Names of police sources and unverified hearsay which might damage the reputations of innocent people are only two of the most obvious examples. But there is also a fundamental need to ensure broad access to government information, if only to assess the performance of public servants and to constrain the expansion of state power. Both the Freedom of Information Act and the Privacy Act of 1974 contain specified exemptions which protect confidentiality while allowing

** Enabling legislation to establish the SBI was enacted in 1937. Organizationally, the Bureau was transferred to the Justice Department, and thus to the control of the Attorney General, in 1971. Under current law, the SBI has original jurisdiction to investigate damage and theft involving state property and "to investigate and prepare evidence in the event of any lynching or mob violence." In addition, the Bureau is authorized at the request of the Board of Elections to investigate possible vote frauds, and is required to aid the Governor with "such services (as, in his judgment) may be rendered with advantage to the enforcement of the criminal law." (G.S. 114-15)*

broad access both to records of government activities and to records kept by the government on the activities of its citizens. There are few indications that FOIA and Privacy Act requests for information in FBI and CIA files have actually hampered the legitimate operations of these agencies, even though such requests have revealed illegal and over-zealous investigations by both.

In North Carolina, the State Bureau of Investigation operates behind a veil of secrecy that shields it from public review and invites abuses of its power. No issues of national or state security justify the suppression of information about the range and depth of its methods and procedures. The Bureau is unlike other state government agencies both in its purpose and in its potential for intrusion and misuse, but these differences suggest a greater rather than a lesser need for constant oversight. How is the public to judge the adequacy or inadequacy of the SBI's work? How are the Governor and the Attorney General to be held accountable at the polls for the activities of the Bureau? How is the General Assembly to monitor the expenditure of public funds allocated to the SBI, which totalled $6.599 million during fiscal 1977? Indeed, how under current law are the legislators to determine whether any of that money was spent to investigate them?

In an open democracy, government secrecy can be nothing more than a limited and specific exception to the general premise that the people's business should always be open to the people. In North Carolina, this premise has been blurred both by vague statutory language and by *ad hoc* exceptions to the public records law. A comprehensive, reasonably qualified clarification of "public access," a state freedom of information act and a state privacy act, should be on the agenda for consideration during the 1979 session of the General Assembly. In addition, the legislators should carefully study the broad statutory powers of the Governor and the Attorney General to manage the SBI, with a view to retrieving some control themselves over the clandestine activities of the Bureau. Without such steps, public officials and private citizens are likely to remain trapped between the letter and the spirit of the current law, and state government will more and more take on the appearance of "a farce or a tragedy or perhaps both." □

POSTSCRIPT

North Carolinians got a peek behind-the-scenes at the State Banking Commission this spring, only to have the curtain hastily rung down on public access to Banking Commission records by an obliging General Assembly. Close on the heels of a Superior Court decision that Commission confidentiality regulations were in violation of the state's public records law, and smarting from the ouster of Banking Commissioner John Tropman and his deputy, Jesse Yeargan, State Treasurer Harlan Boyles sought and got temporary legislation which clamped a tight lid on information about current and past activities of the Commission and the Commissioners.

The State Treasurer, an elected public servant, is also *ex officio* chairman of the Banking Commission. But Boyles is no adversary of bankers, even though he heads the state board which is supposed to regulate banking business. He received a prime interest rate loan of $115,000 from First Citizens Bank when he ran for Treasurer in 1976 and $25,000 in contributions from bankers and businessmen across the state at a fund-raising dinner held in Raleigh in April, 1978.

The Boyles proposal to shut off public disclosure of investigations into banking practices hardly got a dispassionate review in the General Assembly. Of the 31 legislators on the Senate and House banking committees, 17 have close professional or financial ties with the banking industry. None declined to participate in committee hearings on the matter because of potential conflicts of interest. The proposed bill was criticized vigorously by representatives of the N. C. Press Association during the brief hearings. Boyles retorted that the Banking Commission did not "need the news media to tell us whether we are doing a good or bad job."

But who else is there to let him know? The SBI investigation which led finally to the dismissals of Tropman and Yeargan revealed irregularities in their conduct going back to 1974. A summary of the SBI report released by the Governor stated that "at the time the request was received to investigate the alleged activities of Jesse Yeargan, the general public was aware *from newspaper articles and interviews* that officials and employees . . . may have received gratuities and gifts . . . in the form of free trips and home security alarm systems." (Emphasis added) The Yeargan investigation eventually broadened to include Tropman.

The General Assembly will reconsider its 1978 action when a study commission reports to the 1979 session on proposed permanent limits to the disclosure of Banking Commission records. Instead, the legislature should enact a comprehensive state freedom of information act which would apply to the Banking Commission and to all other government agencies as well.